NO. 49304-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CARLOS ALEXANDER LIMA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-01459-3

BRIEF OF RESPONDENT

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SERVICE		
	Jennifer Winkler 1908 E Madison Street Seattle, WA 98122-2842 Email: nielsenc@nwattorney.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 3, 2017, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITIES

RULES AND REGULATIONS

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the state elicited a prohibited opinion as to the guilt of the defendant?

    a. Whether the state elicited a prohibited opinion as to credibility of the defendant?

    b. Whether Lima preserved any issue as to opinion testimony?

2. Whether Lima's conviction for two counts of possession of heroin violated double jeopardy?

3. Whether the 24 month school-zone enhancement was properly applied to Lima's conviction for delivery of material in lieu of controlled substance (CONCESSION OF ERROR)?

4. Whether Lima's sentence on the second degree assault conviction exceeded the statutory maximum (CONCESSION OF ERROR)?

5. Whether Lima should be taxed appellate costs if the state substantially prevails? (STATE WILL NOT SEEK APPELLATE COSTS)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Carlos Alexander Lima was charged by original information filed in Kitsap County Superior Court with first degree assault and second degree unlawful possession of a firearm. CP 1-2. Later, a first amended information was filed charging first degree assault, with firearm special allegation, second degree assault, with firearm special allegation, second degree unlawful possession of a firearm, delivery of material in lieu of controlled substance, with school zone special allegation, maintaining premises for using controlled substances, and two counts of possession of controlled substance, heroin. CP 9-13.

Pretrial, Lima stipulated to a prior conviction for second degree theft as predicate for the unlawful possession of firearm count. CP 21. Findings and Conclusions regarding CrR3.5 were entered concluding that Lima's statements to law enforcement are admissible. CP 29-32. A motion in limine prohibiting one witness from commenting on the credibility of another witness (CP 102-03) was granted. 1RP 15.[1] Also, Lima had no objection to the admissibility of prior bad acts evidence that included that he was Ms. Bennett's drug dealer and that he had sold her fake heroin. 1RP 8.

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[1] The VRP are numbered as volumes I-VII and will be referred to herein as 1RP, 2RP, etc.

Lima advanced a self-defense theory with regard to the two assault counts. The jury was instructed on lawful use of force on those two counts. CP 52-54 (instructions 17, 18, 19).

The jury acquitted Lima on count one, first degree assault. CP 75. He was convicted on all other counts. CP 75-77. The jury also found that Lima was armed with a firearm on count two, second degree assault. CP 79. The jury gave an affirmative answer on the question of whether the delivery in lieu was within 1000 feet of the perimeter of a school ground. CP 80. With regard to the count of maintaining premises for using controlled substances, the jury answered in the affirmative a special interrogatory that the structure was used for keeping or selling heroin. CP 81.

Lima was sentenced to a total of 130 months. CP 84. That sentence included a 36 month firearm enhancement on the second degree assault count and a 24 month school zone enhancement on the delivery in lieu count. CP 83. An order amending the judgement and sentence was entered, which order clarified that the school zone enhancement was to be served consecutive to all other counts. CP 99.

Lima's notice of appeal was timely filed. CP 95.

B. FACTS

Maleisa Bennett was introduced to defendant Lima by Lima's wife. 3RP 384. Ms. Bennett and the wife had met on a ferry when Ms. Bennett smelled heroin smoke coming from an adjacent bathroom stall on a ferry. Id. They became aware that they were both heroin users. Id. Ms. Bennett called a day or two later seeking to purchase heroin from Lima. 3RP 385. She and Lima had both a drug purchasing business relationship and an acquaintance as friends. Id. She bought heroin from him almost every day with transactions occurring at her house, his house, or in cars. 3RP 386.

Lima had been to her house at least 20 times, driving a gold Honda. 3RP 386-87. The two had used heroin together. 3RP 388. Ms. Bennett had also seen other people use and purchase heroin at Lima's house. 3RP 390-91.

On the date of the incident, Ms. Bennett contacted Lima in order to buy heroin. 3RP 392. Lima gave her a ride to the bank to get the purchase money and the transaction occurred in Lima's Honda. 3RP 392. She pocketed the package when Lima dropped her off and went home. Id. She walked home, cooked the substance in preparation to inject, and discovered that it was not real heroin. 3RP 394-95.

This was not the first time she had received a fake substance from

Lima. 4RP 406-07. On the prior occasion, Lima had replaced the fake substance with real drugs. 4RP 407. That situation had caused no argument or fight between Ms. Bennett and Lima and he had remained her drug dealer. 4RP 407-08.

On the present occasion, Ms. Bennett unsuccessfully tried to contact Lima by phone. 4RP 409. Late that night, Ms. Bennett's husband, Derrick Brasier, came home. Id. The two had dinner, Mr. Brasier took a rest, and they went to Lima's house around two a.m. 4RP 410. Ms. Bennett knocked and initially got no response other than Ms. Lima, Nataly, looking out the window. 4RP 414. Eventually, Ms. Lima came to the door and let them in. Id.

Ms. Bennett and Mr. Brasier asked to talk to Lima and were told that he was asleep. 4RP 415. They were having a calm conversation with Ms. Lima in the kitchen and Ms. Lima agreed to try and awaken Lima. Id. Ms. Bennet told Ms. Lima that she was "sick" ("withdrawl" (4RP 418)) and needed heroin or her money back. 4RP 416. Ms. Lima said they had no money and no drugs. Id.

Eventually, Ms. Bennett called out to Lima asking him to come and talk to her. 4RP 419. Ms. Bennet was "whiny" when she said this, not yelling or threatening. 4RP 421-22. She heard Lima respond by saying "where's my pistol. Get my pistol, Nataly." 4RP 422. Ms. Bennett responded that the situation was not that serious and she just

wanted to talk. 4RP 423. Lima continued yelling for his pistol, got out of bed, accused Ms. Bennet of yelling and waking the baby, and began looking for the gun. 4RP 424. Ms. Bennett was surprised by Lima's angry response. 4RP 425-26.

After looking various places around the house for the gun, Lima came out, walked past Ms. Bennett and Mr. Brasier, and started looking in the kitchen. 4RP 426. As Lima continued to look for the gun, Mr. Brasier also told him that they just wanted to talk and that Lima did not need a gun. 4RP 428. At one point, Ms. Bennett remarked to Mr. Brasier that she did not believe Lima had a gun and that Mr. Brasier should "handle this." Id. Mr. Brasier did nothing. 4RP 429. But soon Lima went to "brush past" him and Mr. Brasier grabbed his shirt and held him in place. 4RP 431-32.[2] After this, Lima advocates that they all sit down and talk but Ms. Bennett and Mr. Brasier decline the invitation to sit. 4RP 433-34. At this point, Lima had armed himself; he pulled the gun out and fired a shot in their direction. 4RP 434-35.

Advocating calm, Ms. Bennett and Mr. Brasier move toward the door. 4RP 435. They went out, Ms. Bennett recalling that she went first, Lima was second, and Mr. Brasier was last. 4RP 436. Outside in the alley, Lima hit Mr. Brasier in the head with the gun. 4RP 437. Then, with

[2] On cross examination of Ms. Bennett, this "brushed past" testimony changed to "Carlos charged him." 4RP 479.

Lima standing slightly above on a step and Mr. Brasier holding out his hand in a defensive position, Lima fired another shot into the bank across the alley. Id.

Mr. Brasier and Lima began to wrestle over the gun. 4RP 438. Another shot went off and Mr. Brasier said "ow, ow," and fell to the ground. Id. Lima then ran around the house and entered through another door. Id. Ms. Bennett tried to get Ms. Lima's assistance but failing that grabbed a flower pot and threw it at the car window. 4RP 441. The car was parked to the side of the house and the flower pot broke the front window. 4RP 445. Ms. Bennett went to get her car so she and Mr. Brasier could leave and as she was turning the car around she saw Lima drive past in the Honda. 4RP 446-47.

The foregoing recitation of facts is taken from the point-of-view of Meleisa Bennett. Derrick Brasier's testimony was generally consistent with Ms. Bennett's testimony. His point-of-view is as follows. Mr. Brasier did not really know Lima. 4RP 506. After entering the Lima residence, Mr. Brasier did not participate in the conversation between Ms. Lima and Ms. Bennett. 4RP 508. At first, Lima was not present but Mr. Brasier became aware of his presence by Lima repeatedly, 10 or 15 times, asking where his pistol was located. 4RP 508-09. Mr. Brasier told Lima that he did not need a gun and asked Lima to just come out and talk to them. 4RP 509. As Ms. Lima told Mr. Brasier and Ms. Bennett that they

had no money for them, the tone of the conversation was relaxed without any yelling. 4RP 510.

At that point, Lima tried to "come through me" and Mr. Brasier "stuck my arms out and stopped him." 4RP 511. Lima kept reaching for his waist-band as though reaching for a gun. 4RP 512-13. Eventually, Lima "jumped back, grabs the gun off the top of the fridge, gets it ready, shoots into the living room to the couch or the wall." 4RP 513-14, 515. Now ready to leave, Mr. Brasier recalled that he was the last one out the door into the alley. 4RP 516. Then, "my first step out the door was pistol whipped to the side of the ear, twice." 4RP 516.

Mr. Brasier walked some feet away and then heard another gunshot. 4RP 517. Then, Mr. Brasier saw Lima go after Ms. Bennett and he decided to grab Lima. 4RP 517. They wrestled for a few seconds "and that's when he put the gun on my hip here and shot me." 4RP 517. Mr. Brasier did not think the shot was an accident because Lima "physically pushed it hard" to his hip. 4RP 518. After a few moments, during which time Lima had gone back in the house, Lima came back outside, got in his car and drove it at Mr. Brasier and hit him. 4RP 520, 522. Lima then drove away. 4RP 522.

Further testimony is addressed as relevant to the particular issue being addressed.

III. ARGUMENT

A. THE ISSUE REGARDING OPINION TESTIMONY WAS NOT PROPERLY PRESERVED, LACKS MERIT BECAUSE IN FACT NO "TESTIMONY" IN THE FORM OF AN OPINION WAS RECEIVED, BECAUSE THE QUESTION ASKED WAS PROPER IMPEACHMENT, AND BECAUSE IN THE CONTEXT OF THE ENTIRE CASE THE ALLEGEDLY OFFENDING QUESTION WAS HARMLESS.

Lima argues that a question posed by the prosecution constituted misconduct because the question asked for an opinion as to guilt. First, this issue was unpreserved. Next, this claim is without merit because the witness did not testify as to the alleged opinion on guilt, she was merely assessing the strength of the state's case with the defendant, her husband. Next, because the trial court sustained the defense objection to the question, Ms. Lima never in fact testified as to her opinion of Lima's guilt. Moreover, Ms. Lima was being impeached after having engaged in multiple lies and omissions in statements before trial and her opinion on the strength of the state's case, in the context it was assert, was no more than just that.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and

prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The defendant has the burden of establishing prejudice by proving that "there is a *substantial* likelihood [that] the in stances of misconduct affected the jury's verdict." Id. at 442-43 (emphasis added) (bracket in original). Lima must surmount this high burden in order to prevail on this claim.

1. Lima did not preserve an issue regarding an opinion as to the credibility of Lima or of any witness and did not preserve an issue regarding an opinion as to guilt by not seeking a curative instruction at trial.

The first observation here is that Lima seems to raise a new issue on appeal. He assigns error to the prosecutor's question about the assault count which question in no way commented on whether or not Lima's testimony, or his defense, had credibility. In fact, as noted by Lima, the defense preserved error by an objection as to the issue of opinion as to guilt only; even if the prosecutor's statement can be bootstrapped into a question about credibility, Lima did not preserve the issue on that ground. *See* RAP 2.5. (see discussion of manifest error below at section (A)(1)(a).)[3]

Defense counsel asserted a general objection when the question was asked. 7RP 896 ("Your Honor, I'm objecting to that."). Then, after

[3] It should be noted that the allegedly offending statement by Ms. Lima was based on a misapprehension of the law. The prosecutor advised the court that Ms. Lima would

the jury left the room, defense counsel fleshed out his objection: "It's asking the witness to convey her belief as to whether the defendant is guilty or innocent." Id. The parties then argued the point at some length (7RP 896-901) and the trial court sustained the objection "[b]ecause I am concerned that we're going way outside the bounds of impeachment." 7RP 901-902. Nowhere did the defense raise the issue of opinion as to credibility and the trial court did not rule on that issue (arguably, the trial court did not rule on the guilt opinion issue either).

"As a general rule, an objection that does not specify the particular ground upon which it is made does not preserve the question for appellate review." *State v. Pittman*, 54 Wn. App. 58, 66, 772 P.2d 516 (1989), *rev denied*, 116 Wn.2d 1020 (1991), *overruled on other grounds, State v. Batista*, 116 Wn.2d 777, 788, 808 P.2d 1141 (1991); *see also, State v. Hill*, 152 Wn. App. 1014 (2009), (UNPUBLISHED AND UNBINDING) (quoted rule survives *State v. Batista)*. There is an exception: "The only exception to this rule is that the propriety of the ruling will be examined on appeal if the specific basis for the objection was apparent from the context." 54 Wn. App. at 66. Here, Lima's initial objection was not specific, he then explained the grounds for his objection outside the presence of the jury never referring to credibility, and the trial court ruled

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testify that the result was likely because "you still shot the gun." 7RP 897.

on the scope of impeachment. Thus, the credibility opinion issue was not subject to objection below and was clearly not apparent from the context to either the defense or the trial court. Lima asserts the credibility issue here in an obvious attempt to cast the state in a bad light because the state violated its own motion in limine. The alleged credibility issue was not preserved by proper objection and should not be reviewed.

Further, having a sustained objection in hand, Lima did not request that the trial court assert a curative instruction. A rule closely allied with the specific objection rule here applies: "absent any request for a mistrial or curative instruction, we will not reverse unless the prosecutor's conduct was so prejudicial that no curative instruction could have obviated the prejudice." *State v. Israel*, 113 Wn. App. 243, 289, 54 P.3d 1218 (2002) (*citing State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)), *rev denied* 149 Wn.2d 1013 (2003). In the present case, that rule applies to either an objection regarding opinion as to guilt or one regarding credibility. In particular, because Ms. Lima did not answer the allegedly offending question, it is clear that the jury could have been charged to disregard counsel's last question.

More fundamentally, in this as with any jury trial, the jury was instructed that the evidence in the case consisted of admitted testimony, stipulations, and exhibits (CP 34), that the lawyer's remarks, statements,

and arguments are not evidence (CP 35), and that the jury is not to be influenced by or make any assumptions about a lawyer's objections. CP 35. "Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Lima asserts no evidence to the contrary. Given the ease with which a curative instruction could have been given and given that the jury is presumed to follow that particular instruction and the general instructions, it is at least difficult to assay why a curative instruction would not have "obviated the prejudice."

On this issue, Lima assumes that he was prejudiced because he assumes that the jury would not follow the trial court's instructions. This assumption, were it a rule of law, would undermine confidence in any verdict by any jury. Here, the jury had no chance to follow the trial court's curative instruction because none was requested and thus none was given. This situation gives rise to all the negatives attending a failure to preserve an issue. Any impropriety could have been cured in the trial court but Lima is allowed to seek reversal in this Court merely because he slept on his rights below. Under the circumstances of this case, then, Lima's complaint, whether considered an opinion as to guilt or one as to credibility of his defense, does not warrant reversal because not properly preserved.

a. Not manifest error affecting a constitutional right.

Lima argues that the error here was constitutional in nature. But Lima must assert a "manifest error affecting a constitutional right." RAP 2.5(3). Thus, "the error must be manifest and truly of constitutional dimension." *State v. Kirkman,* 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (En Banc). And, "[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review." Id., *citing State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Moreover, it has long been held that an issue regarding an opinion as to guilt does not automatically raise a manifest constitutional error that may be raised for the first time on appeal. *See City of Seattle v. Heatley,* 70 Wn. App. 573, 583-587, 854 P.2d 658 (1993), *rev denied* 123 Wn.2d 1011 (1994) (considering whether allegations of improper opinion may be raised for the first time on appeal). Lima must show actual prejudice. And actual prejudice is unlikely on this record.

Paramount to Lima's opinion claims is the supposition that this jury would have been swayed by anything that Ms. Lima said. *See State v. Kirkland, supra* (reviewing court looks to the actual testimony involved in deciding similar issue). During her cross-examination, Ms. Lima admitted

to multiple lies and omissions. She had given at least three pretrial statements about this incident—to the responding police, to the defense investigator, and to the prosecutor. Her bias as Lima's wife was established. 7RP 860. She admitted she lied to a police detective the night of the incident. 7RP 860-61. After counting out the people she had made statements to, she was asked whether "the information that you provided on these different occasions, they changed throughout the course of these interviews, didn't they?" And Ms. Lima replied "yes." 7RP 862. She admitted that she found the interview with the prosecutor frustrating not because she was asked difficult questions but because she did not want to tell the truth. 7RP 864. Further, she admitted that she was looking for a way around the truth. Id. She admitted that her trial testimony was different than her statement to the police detective and different than her statement in interview with the prosecutor. 7RP 864. She admitted that immediately after the incident she wanted to avoid contact with the police because she had had no time to coordinate her story with her husband's story. 7RP 884-85. She admitted that she lied about being present at the time of the incident. 7RP 885-86. She admitted that she lied about never seeing her husband with a gun. 7RP 886. She admitted that she had made the statement "Well I just started lying about everything, because I didn't want to get in trouble." 7RP 886.

These listed exchanges are the times that she directly admitted lying. The cross-examination also included multiple instances of pointing out the inconsistencies in her various statements. Further, the cross-examination is full of references to her wanting to lie to avoid incriminating her husband and references to her discussion of her story with her husband on the phone from the jail. The entire cross-examination should be considered but it would be in no sense "brief" to include it all herein. Ms. Lima was thoroughly impeached. The record shows that an assertion that the jury would have credited her testimony at all is clearly mistaken. *See* Appellant's Brief at 34 ("the case came down to the credibility of the witnesses, and in particular, Nataly.") By the time the prosecutor's cross was finished, Ms. Lima had no credibility at all.

Thus, based on a question that Ms. Lima did not even answer, Lima cannot show actual prejudice in this case. There is, therefore, no "manifest" error in this record on this issue. Lima's failure to object to a credibility opinion (because, ultimately, there was none) and his failure to seek curative action in the trial court on his objection to the alleged guilt opinion leaves this issue unpreserved and it should not be reviewed.

2. The question asked sought an admissible lay opinion which is no less admissible because it embraced an ultimate issue in the case and which was also admissible for the limited purpose of impeachment.

"The general rule is that no witness, lay or expert, may testify to

his opinion as to the guilt of a defendant, whether by direct statement or inference." *City of Seattle v. Heatley,* 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *rev denied,* 123 Wn.2d 1011 (1994) (internal quotation omitted). "However, testimony that is not a *direct comment* on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." 70 Wn. App. at 578 (emphasis added); *State v. Johnson,* 152 Wn. App. 924, 930-31, 219 P.3d 958 (2009). ER 704 allows opinions about the ultimate issue in a case; "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The "otherwise admissible" clause requires that the opinion is subject to the other rules of evidence. 70 Wn. App. at 579.

The issue, then, turns on the relevance of the ultimate issue to the purpose for which the testimony is sought.

> Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an "ultimate issue" will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.

Id. Moreover, ultimate issues aside, lay opinions are allowed if

> (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific,

technical, or other specialized knowledge within the scope of ER 702.

ER 701.

Here, Ms. Lima was a hostile witness being subjected to impeachment. She admitted that she was biased and because of that bias had repeatedly fabricated her statements or omitted material facts. Moreover, the record is clear that she colluded with Lima to tailor her testimony to his. Also, as noted above, the question asked was not a "direct comment" on guilt. Rather, the question alluded to her assessment of the strength of the state's case on the assault count. Further, the sought opinion was based on Ms. Lima's perception of the incident, was helpful to the jury in understanding her testimony, was not based on scientific or technical knowledge, and was therefore an admissible opinion under ER 701. The fact that it also may have embraced an ultimate issue is permissible under ER 704.

Further, the import of the question to the task of impeachment is seen from the context in which it was asked. *See State v. Israel,* 113 Wn. App. 243, 289, 54 P.3d 1218 (2002), *rev denied,* 149 Wn.2d 1013 (2003) ("The law allows cross-examination of a witness into matters that will affect credibility by showing bias, ill will, interest, or corruption.") That is, the jail phone call from which the statement was taken is easily characterized as an exercise in making Ms. Lima's lies seem more credible

in light of the other evidence received, i.e., it shows attempted corruption of the process. The allegedly offending question was for the purpose of showing that it was Ms. Lima's position that she could not in fact credibly lie about the assault charge since Lima in fact shot the gun. Her opinion was not therefore about Lima's guilt but about what lies she could get away with in light of the true facts. It highlighted her attempts to minimize the incident in favor of her husband. It raised an inference that she knew the true facts but was studiously avoiding them. Bringing out this situation was helpful to the trier of fact in assessing Ms. Lima's credibility.

The allegedly offending question did not seek to elicit a direct comment on Lima's guilt, served the separate and proper purpose of impeachment, and was not objectionable as a lay opinion or because it embraced an ultimate issue. Lima's claim fails.

3. The error, if any, was harmless.

Even if the situation discussed was error, under the total circumstances of this case, such error was harmless. First, without repeating the above review of Ms. Lima's entire testimony, the conclusion from that review undermines any confidence that Ms. Lima's testimony influenced the verdict (recalling of course that since she did not answer the allegedly offending question, she did not in fact testify as to her opinion).

Second, insofar as Ms. Lima could be so roundly discredited, Lima in a sense invited any error by calling her in his case-in-chief. Third, if Ms. Lima had answered the question and admitted that that was her assessment of the case, she would have then answered the follow-up question that that assessment resulted from her percipient knowledge that Lima had in fact shot the gun. Point being that nothing in the excluded exchange would have changed that primary fact, which was corroborated by each witness present during the incident. Moreover, it is clear from the entire record that the fact that Lima shot Mr. Brasier was done neither in self-defense nor defense of others. Anything, Ms. Lima said taken away, the same verdict would have resulted.

B. THE TWO CONVICTIONS FOR POSSESSION OF HEROIN DID NOT VIOLATE DOUBLE JEOPARDY BECAUSE THE FACTS SHOW A BREAK BETWEEN THE TWO POSSESSIONS.

Lima next claims that his two convictions for possession of heroin were had in violation of double jeopardy—that the unit of prosecution for his two counts should have been one. This claim is without merit because the facts establish two independent instances of possession.

Double jeopardy is a question of law that is reviewed de novo. *State v. Womac,* 160 Wn.2d 643, 649, 160 P.3d 40 (2007). Both the Fifth Amendment of the federal constitution and article 1, section 9 of the

Washington Constitution protect against multiple punishment for the same offense. *See State v. Calle,* 125 Wn.2d 769, 777, 888 P.2d 155 (1995). Both constitutions test whether multiple convictions constitute multiple punishment for the same offense by application of "same evidence" or "same elements" analysis focused on whether the various offenses of conviction are the same in law and in fact. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *Calle,* 125 Wn.2d at 777-78. This test applies when there are multiple convictions for separate and distinct crimes. *State v. Adel,* 136 Wn.2d 629, 633, 956 P.2d 1072 (1998).

However, where the defendant is convicted of violating one statute multiple times, the "unit of prosecution" test applies. *Adel*, 136 Wn.2d at 633. A reviewing court applying the unit of prosecution test looks to the statute in question to determine what criminal conduct, or unit of prosecution, the legislature intended to be the punishable act. *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). If the legislature does not define the unit of prosecution or the legislature's intent is unclear, the rule of lenity applies and ambiguity is resolved against turning a single transaction into multiple offenses. *Tvedt*, 153 Wn.2d 705, 711, *quoting Adel,* 136 Wn.2d at 635.

A consideration of whether or not various behavior by a defendant

is a continuing course of conduct, allowing for a single unit of prosecution for the continuing course, is necessarily case-by-case. *See State v. Morales,* 174 Wn. App. 370, 389, 298 P.3d 791 (Korsmo, C.J. dissenting). "The continuing conduct analysis is a factual inquiry applying the unit of prosecution to the charged behavior." Id. A given defendant under a given set of facts may be charged with multiple counts under one statute even where statutory analysis reveals that that statute has but one unit of prosecution. In such cases, multiple counts may be advanced without offending double jeopardy when the facts supporting each count show that on each occurrence those facts evinced a separate and distinct crime.

State v. Davis, 142 Wn.2d 165, 12 P.3d 603, supports this assertion. The *Davis* Court held that convictions for two separated marijuana grow operations supporting two charges of possession with intent to manufacture or deliver did not violate double jeopardy even though both counts were charged under the same statute. Id. at 177. "Even where the Legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one 'unit of prosecution' is present." 142 Wn.2d at 176; *see also State v. Varnell,* 162 Wn.2d 165, 168, 170 P.3d 24 (2007) ("the facts of the particular case may reveal more than one unit of prosecution is present."). Admittedly, the *Davis* holding was based in part on the intent element in the statute.

And here, as in *Abel, supra,* we deal with simple possession which has no intent element. However, *Davis* shows that the holding in *Abel* is amenable to exception depending on the facts of the particular case.

The facts of the particular case led to a holding that two counts of attempting to elude a police vehicle were not double jeopardy in *State v. Chouap,* 170 Wn. App. 114, 285 P.3d 114 (2012). Since obviously charged under the same statute, the *Chouap* Court applied the unit of prosecution test. The facts were that one pursuit was unsuccessful and Chouap returned to normal driving before the second pursuit commenced. Id. at 125. Under these facts, the two eluding charges were proper. Thus if the particular facts of a case show some sort of break in the action or attenuation of the continuing course of conduct, multiple charges from the same statute might not violate double jeopardy. In a case where 1,200 phone calls supported tampering with a witness charges, only one unit of prosecution was found upon a reading of the statute but "[o]ur determination might be different if Hall had changed his strategy ... or if he had been stopped by the State briefly and found a way to resume his witness tampering campaign." *State v. Hall,* 168 Wn.2d 726, 737, 230 P.3d 1048 (2010).

In the present case, Lima constructively possessed the heroin found in his bedroom. 6RP 656. But during this incident, Lima fled the

residence in the car in which the second quantity of heroin was later discovered. 5RP 577-78. He had been gone from the scene for ten or fifteen minutes when he returned to the alley behind the house. 6 RP 742. He was stopped by police while driving that car. 5RP 566. The car was impounded by police and towed to a secure evidence garage. 6RP 682. Three days after the incident, a police officer searched the car at the secured location. 6RP 687. In a cup holder (immediately next to the driver, 6RP 723) in the car, the officer observed items used to smoke drugs and a knife with drug residue on it. 6RP 689. A Bic lighter was found next to the other drug paraphernalia. 6RP 690.

In *Abel*, the single unit of prosecution applied because the facts were characterized as being merely separate "stashes" within a single on-going possession. But here Lima could have come into the second possession during the time-period between the shooting incident and the police stop and seizure of the car, which search was separate from the search of the house that had discovered the first quantity. The location of the drug evidence can be used to infer that Lima retrieved more heroin and smoked it during his flight from the scene and his disposal of the gun.

Under these facts, then, there is good reason to allow both charges to stand; otherwise a cagy defendant who knows the holding in *Abel* could go forth into the world get dope, possess it, and use it up over and over

and protect herself from multiple counts of possession by the simple expedient of always leaving a small quantity on her night stand at home. Since Lima could have done just that under the facts of this case, the two possessions can be seen as separate and distinct from one another and the two convictions do not violate double jeopardy because based on separate acts of possession.

C. A 24 MONTH SCHOOL-ZONE ENHANCEMENT WAS ERRONEOUSLY APPLIED TO LIMA'S CONVICTION UNDER RCW 69.50.4012 (CONCESSION OF ERROR).

Lima next claims that a school zone enhancement under RCW 69.50.435 was improperly applied to his conviction for delivery substance in lieu of a controlled substance under RCW 69.50.4012. RCW 69.50.435 provides that the enhancements therein apply to offenses involving delivery of a controlled substance or profiting from the delivery of a controlled substance. Lima correctly asserts that the offense prohibited by RCW 69.50.4012 is not listed in RCW 60.50.435. Moreover, no other provision of Title 69.50 RCW seems to allow application of the subsection .435 enhancement to violations of subsection .4012.

Further, the Sentencing Reform Act, specifically RCW 9.94A.533(6), which refers to the subsection .435 enhancement, provides for the 24 month increase if the offense was also a violation of 69.50.435. The language of 9.94A.533(6) does not expand the application clause of

subsection .435. Thus the state concedes that the 24 month school zone enhancement was erroneously applied to Lima's sentence.

D. LIMA'S SENTENCE ON THE SECOND DEGREE ASSAULT CONVICTION EXCEEDED THE STATUTORY MAXIMUM (CONCESSION OF ERROR).

Lima next claims that his total sentence (including supervision) of 124 months on his second degree assault conviction is in violation of the statutory maximum sentence. Second degree assault is a class B felony with a statutory maximum of 120 months. RCW 9A.36.012; RCW 9A.20.020; RCW 9.94A.533. Lima is therefore correct that the 124 month sentence is four months too long. The matter should be remanded so that the community custody portion of the sentence may be reduced in order to bring the sentence within the statutory maximum. RCW 9.94A.701(9).

E. THE STATE WILL NOT SEEK APPELLATE COSTS SHOULD THE STATE SUBSTANTIALY PREVAIL.

Lima next claims that he should not be taxed appellate costs in this matter if the state substantially prevails. Without conceding the legal argument in favor of cost in cases such as this, the state asserts that as a matter of policy in this office, it will not assert a bill for costs should the

state prevail on this case.

IV. CONCLUSION

For the foregoing reasons, Lima's convictions should be affirmed. The Court should order remand to correct the errors in sentencing.

DATED April 3, 2017.

Respectfully submitted,

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KITSAP COUNTY PROSECUTOR
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Court of Appeals Case Number: 49304-7

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